Supreme Court, U.S.
FILED

97 • 388 SEP 2 1997

OFFICE OF THE CLERK
No.

In The

Supreme Court of the United States

October Term 1997

LDG TIMBER ENTERPRISES, INC.,

Petitioner,

v.

Dan Glickman, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

PETITION FOR WRIT OF CERTIORARI

David A. Linn
Counsel of Record
P O Box 2347,
40061 Highway 49
Suite 101,
Oakhurst, Ca 93644-9560
(209) 683-7333

APPELLATE SERVICE: CURRY & TAYLOR (800) 222-8738

50 pp

QUESTION PRESENTED

Whether the Court of Appeal for the United States Federal Circuit properly affirmed the Department of Agriculture Board of Contract Appeals decision where:

The record showed that Appellant did not received contract term adjustments in excess of the actual time lost removing the damaged timber.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
TITLE PAGE 1
OPINIONS BELOW 2
STATEMENT OF JURISDICTION 3
STATUTES INVOLVED 4
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE WRIT 6
I. THE EVIDENCE ESTABLISHED THAT LDG WAS NOT COMPENSATED FOR ITS LOST TIME. 6
CONCLUSION 13
APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1a
APPENDIX B -- OTHER RELEVANT OPINIONS 12a

TABLE OF AUTHORITIES

Pag

Statutes

28 U.S.C. Section 1254(1) 3
41 U.S.C. Section 601-613. 3
41 U.S.C. Section 607 3

No.

In The

Supreme Court of the United States

October Term 1997

LDG TIMBER ENTERPRISES, INC.,

Petitioner,

v.

Dan Glickman, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, LDG TIMBER ENTERPRISES, INC., respectfully prays that a writ of certiorari issue to review the judgment of the United State Court of Appeal for the Federal Circuit, entered in the above in the above preceding on June 4, 1997.

OPINIONS BELOW

The opinion and Judgment of the United States Court of Appeals for the Federal Circuit, dated June 4, 1997, was reported. A copy of the opinion is reproduced in the Appendix at p. 1a. The decision of the board of contract appeals dated August 25, 1995 is reproduced in the appendix starts at p. 12a. The ruling on Appellant's motion for reconsideration before the board of contract appeals United States Department of Agriculture date November 17, 1995 is attached in the appendix at p. 32a.

JURISDICTIONAL STATEMENT

The Board of Contract Appeals, United States Department of Agriculture has jurisdiction over this action pursuant to Contract Disputes Act, 41 U.S.C. Section 601-613.

The United States Court of Appeal for the Federal Circuit had jurisdiction to hear the case pursuant to Title 41 U.S.C. Section 607.

The Jurisdiction of Supreme Court to review the Judgement of the United States Court of Appeals for the Federal Circuit is invoked pursuant to 28 U.S.C. Section 1254(1)

Notification is required by rule 29.4(b) have been made.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

41 U.S.C. Section 601-613

These are constitutional provisions and statutes establishing that the U.S. Department of Agriculture Board of Contract Appeals has jurisdiction to hear disputes between contractors and the United States Department of Agriculture

41 U.S.C. Section 607

Appeals from the U.S. Department of Agriculture Board of Contract Appeals are properly brought before the United States Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

This case was decided by the United States Court of Appeals for the Federal Circuit on June 4, 1997 after briefing and argument. The Court concluded that a contracting officer as an official representative of the government, in doing business with the public, has the authority to modify public contracts. Additionally, the court found that when a contracting officer administers a contract with which the officer is charged, promises and representations made by the officer, when within the scope of the subject matter of the contract, cannot be avoided by simply disclaiming contracting officer's authority when the contract reaches litigation.

The Court however did find that the board was correct in denying LDG's claim based upon the allegation that LDG received contract term adjustments totally more days that actual time lost removing fire damaged timber. The board found the 214 days were lost, accepting the position of the government's witness who testified that the Blacksmith timber sale was not operable after November 30, 1988. This finding was made even in light of the fact that the government's position was strongly disputed by LDG during the board's hearing. The Court of Appeals however concluded that the board's finding turned on matters of credibility and weight and therefore the Board of Contract Appeals decision was affirmed.

REASONS FOR GRANTING WRIT

1. THE EVIDENCE ESTABLISHED THAT LDG WAS NOT COMPENSATED FOR ITS LOST TIME.

As an alternative route for denying LDG's claim the Board found that LDG, "Received contract term adjustments totaling more days than the actual time lost removing fire damaged timber from the boundary timber sale." (a)

The board found that 214 days were lost, accepting the position of the government witness who testified that the Blacksmith's sale was not operable after November 30, 1988.

At the hearing, a representative of a saw mill, the purchaser of other sales, the Meg and Wall timber sales, in the same area as the Blacksmith sale, testified that those sales had been operational until December 20, 1988. This witness had been involved in road construction for the Blacksmith sale in 1976, was on the sale area during operations, and had driven into the area a number of times. His testimony showed that he was very familiar with the area in question and along with other evidence introduced at the time of the Board hearing clearly established that timber operations on the Blacksmith sale continued until at least December 20, 1988.

To rebut the Appellant's eyewitness testimony, the Forest Service called an eco-system management officer for the Sierra National Forest, who had originally laid out the Meg and Wall sales. This individual had never been on the Blacksmith Timber sale and was not familiar with

the lands elevation and topography. This individual additionally testified that even assuming the Meg and Wall sales had been operable in November and December of 1988, this witness stated, only a field review, would have shown whether Blacksmith also could have been operated at the time. The direct testimony of LDG's owner, Mr. George, clearly established, and was not rebutted, that the Blacksmith timber sale was operational through December 20, 1988.

Admittedly, evidentiary rulings of the various Contract Board's carry great weight. These rulings however are subject to review by the United States Court of Appeals for the Federal Circuit. From the record, it is clear that the court failed to properly review the Board's evidence and therefore, although LDG has proven its legal point in the lower court it has still been defeated by non-substantial evidence.

CONCLUSION

The Petitioner requests review by the Supreme Court of the evidence considered by the United States Court of Appeals for the Federal Circuit. The overwhelming evidence in the lower courts clearly establish that the petitioner's claim should have been granted.

The Petition for Certiorari should therefore be granted.

Respectfully Submitted,

David A. Linn
Counsel of Record
P O Box 2347,
40061 Highway 49
Suite 101,
Oakhurst, Ca 93644-9560
(209) 683-7333

UNITED STATES COURT OF APPEALS FOR THE – FEDERAL CIRCUIT

96-1139

LDG TIMBER ENTERPRISES, INC.,

Appellant,

v.

Dan Glickman, SECRETARY OF AGRICULTURE,

Appellee.

David A. Linn, Linn, Lindley & Blate, of Oakhurst, California, argued for appellant.

Deborah A. Bynum, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for appellee. With her on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and Jeanne E. Davidson, Assistant Director.

Appealed from: Department of Agriculture Board of Contract Appeals

United States Court of Appeals for the Federal Circuit

96-1139

LDG TIMBER ENTERPRISES, INC.,

Appellant,

v.

Dan Glickman, SECRETARY OF AGRICULTURE,

Appellee.

DECIDED: June 4, 1997

Before ARCHER, Chief Judge, SMITH, Senior Circuit Judge, and NEWMAN, Circuit Judge.

NEWMAN, Circuit Judge.

LDG Timber Enterprises, Inc. (LDG) appeals the decision of the United States Department of Agriculture Board of Contract Appeals, AGRBCA Nos. 91-213-1 and 95-228-R, denying LDG's claim for damages based on

---

LDG Timber Enterprises, Inc., 95-2 BCA 27,906 (Aug. 22, 1995); LDG Timber Enterprises, Inc., 96-1 BCA 28,049 (Nov. 17, 1995).

certain timber contracts in national forests. We affirm the Board's judgment.

BACKGROUND

This case concerns the relationship between two timber contracts: the Blacksmith Timber Sale in the Sierra National Forest and the Boundary Timber Sale in the Sequoia National Forest. LDG's performance of the Blacksmith contract was required to be completed by June 25, 1988, and the Boundary contract by March 31, 1992. During the summer of 1987, while LDG was logging the Blacksmith area, a fire occurred at the Boundary area. The Forest Service estimated that 40% of the remaining Boundary timber would die because of insect infestation and other events that follow a forest fire. LDG, with the agreement of the Forest Service, transferred its operations in the fall of 1987 to the Boundary sale area in order to harvest and salvage the remaining timber. In view of this transfer of operations, various time extensions to the Blacksmith contract ensued. The Forest Service refused to extend the Blacksmith contract beyond October 15, 1989, leading to this dispute.

The extensions to the Blacksmith contract were documented as follows: By letter of March 10, 1988 the Forest Service, through Contracting Officer Moyle, wrote that the twenty-five days lost between June 1, 1988 (the start of the Normal Operating Season for Blacksmith) and June 25, 1988 (the original Blacksmith completion date) would commence seven days after the work at Boundary

---

The Normal Operating Season is that period during which a timber sale is expected to be operable based on weather and road conditions.

was completed, subject to certain contingencies not here relevant. By contract modification with letter of June 17, 1988 the contracting officer extended the termination date of the Blacksmith contract to August 12, 1988. By contract modification with letter of August 11, 1988 the contracting officer extended the termination date of the Blacksmith contract to August 11, 1989. The contracting officer wrote:

> If additional adjustments in termination date is requested after operations on fire damaged timber is completed, operating days available to you on the Blacksmith Timber Sale that may occur outside the normal operating period will be included in determining a new contract termination date.

LDG points to this letter as confirming the Forest Service's promise of "day for day" credit for the days not worked at Blacksmith because of the Boundary operations, subject only to weather or road conditions (i.e., available operating days) at Blacksmith.

LDG resumed operations at Blacksmith in June 1989, and on July 5, 1989 LDG requested further extension of the Blacksmith contract in accordance with these arrangements. On July 26, 1989 the contracting officer sent a contract modification to extend the Blacksmith termination date to November 30, 1989, but added the condition that the Blacksmith Normal Operating Season would be redefined as extended to November 30, 1989. Contracting Officer Moyle's letter of July 26 stated:

> The contract term is being extended to November 30, 1989 pursuant to B8.21 Contract Term Adjustment (CTA). The CTA is being offered to compensate for time you have spent logging fire damaged timber on the Sequoia National Forest Boundary Timber Sale through November 30, 1988. Boundary Timber Sale operations after that date are not being included in the CTA because Blacksmith Timber Sale was not operable during that period of time.

Section B8.21 Contract Term Adjustment provided:

> [In applicable circumstances] the contract term shall be adjusted in writing to include additional calendar days in one or more Normal Operating Seasons equal to the actual time lost . . . .

The Blacksmith contract set the Normal Operating Season for that area as from June 1 to October 15 of each calendar year. With specified exceptions, LDG was permitted by the Blacksmith contract to conduct timber operations outside the Normal Operating Season, if weather and ground conditions permitted.

LDG promptly objected to the part of the July 26, 1989 letter that proposed enlargement of the Blacksmith Normal Operating Season to November 30, 1989, stating that such enlargement was not in LDG's interest since it foreclosed LDG from obtaining additional working days without consuming contract extension days; LDG requested extension of the contract to September 5, 1990, that is, into the ensuing Normal Operating Season. Contracting Officer Moyle then withdrew the proffered extension, and on August 1, 1989 presented a formal

contract modification finally terminating the Blacksmith contract on October 15, 1989, with a letter wherein the contracting officer stated that he was "incorrect" when he wrote LDG a year earlier (on August 11, 1988) with the contract extension then provided, that additional days of extension would be available at Blacksmith based on Boundary activities outside of the Blacksmith Normal Operating Season. The contracting officer also advised LDG that LDG could "qualify for a contract term extension by cutting and removing at least 75% of the advertised sale volume" by October 15, 1989. LDG executed, under protest, the contract modification accompanying this letter.

LDG had cut 60-65% of the Blacksmith timber by October 15, 1989. The contracting officer refused further extension, and LDG appealed to the Department of Agriculture Board of Contract Appeals, seeking extension of the Blacksmith contract. The Board dismissed that appeal without prejudice, holding that it had no authority to grant the requested form of relief. LDG then filed a claim for damages, in the amount of the contract price of the uncut timber. The contracting officer denied the claim, and LDG appealed to the Board.

In the Board proceedings LDG's position was that it was wrongly denied extension as was needed to complete logging of the Blacksmith sale. LDG stated it had relied on the Forest Service's representations that it would extend the term of the Blacksmith sale, day for day, for the time spent on the Boundary sale both within and outside the Blacksmith Normal Operating Season. LDG also stated that the offer to extend the term to November 30, 1989 was wrongfully withdrawn, referring to Contracting Officer Moyle's sudden action on August

1, 1989 wherein he set the final deadline of October 15, 1989, leaving insufficient time for LDG to log the remaining 5,245,000 board feet of the Blacksmith sale. LDG stated that the Forest Service was required to extend the contract in accordance with its representations, and that LDG was entitled to an extension into the following year's Normal Operating Season and commensurate damages.

In an initial ruling the Board held that the Forest Service was not bound by the representations accompanying the various contract modifications, holding that "[t]he CO's actions do not rise to the level of a formal contract modification." The Board held that the issue was controlled by the theory of equitable estoppel. After a subsequent hearing that was focussed on this theory, the Board held that LDG had failed to establish an essential element of equitable estoppel: detrimental reliance on the contracting officer's promises. The Board also held, as an alternative ground of denial of LDG's claim, that LDG had received more days of extension at Blacksmith than the total day-for-day credit it had earned for the days worked on the Boundary sale. Thus the Board held that LDG could not prevail even on its theory based on contract principles. This appeal followed.

DISCUSSION

The Contract Disputes Act sets the standard of appellate review of decisions of the agency Board of Contract Appeals. The Board's findings of fact must be sustained unless they are arbitrary, capricious, or not supported by substantial evidence, while the Board's

conclusions of law receive plenary review on appeal. 41 U.S.C. §609(b).

A

The government argued before the Board, and again in its briefs to this court, that Contracting Officer Moyle exceeded his authority in promising to include the days that LDG worked outside the Normal Operating Season, to extend the Blacksmith termination date. The government argued that the burden was on LDG to prove that the contracting officer was acting within his authority, citing Federal Crop Insurance Co. v. Merrill, 332 U.S. 380, 384 (1947) and stating that "because clause B8.21 does not, by its terms, allow extensions for delays outside the NOS, the CO exceeded his authority under the terms of the contract to the extent he promised or authorized them."

The contracting officer is the official representative of the government in doing business with the public. See FAR 2.101, 48 C.F.R. §2.101 ("`Contracting Officer' means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.") This carries with it the authority to modify contracts. See Gene Peters v. United States, 694 F.2d 687, 693 (Fed. Cir. 1982) ("This delegation of authority to the Forest Service Chief to enter into such contracts [to sell timber] necessarily and inherently includes the authority to enter into modifications of them as well.") When the contracting officer administers a contract with which the officer is charged, the promises and representations made by the officer, when within the scope of the subject matter of the contract can not be avoided by simply disclaiming the

contracting officer's authority when the contract reaches litigation.

Although the private sector contracting party bears certain risks if federal agents act beyond their authority, see Federal Crop Insurance, the letters from Contracting Officer Moyle were within the scope of the contracts with LDG and the routine administration thereof. According to LDG, Contracting Officer Moyle testified before the Board that he "did not even know he was exceeding his authority." Attorney argument is insufficient to overcome the presumed regularity of an act of contract administration that is prima facie within the contracting officer's assignment. In contrast, in Federal Crop Insurance a publicly available regulation expressly prohibited the act of the government agent on which the private contractor had relied. No regulation prohibited the contracting officer from making the representations and modifications he made, over a period of several years, administering these contracts without objection from the Forest Service.

The several contract modifications were all concerned with the Blacksmith contract in accordance with the adjustments flowing from the fire at Boundary, all of which reflected the regulations and practices of the Forest Service. When the actions of the contracting officer are within the authority that pertains to the subject matter of the contract, and no statute or regulation limits that authority, as in Federal Crop Insurance, the agency bears the burden of coming forward with evidence of lack of authority for the actions of the contracting officer. This burden is not met simply by attorney allegation in a litigation context.

No statute, regulation, or rule was cited as violated by the contract extensions and representations of Contracting Officer Moyle, and indeed nothing in these routine arrangements reasonably suggested lack of authority. Thus it was not necessary for LDG to prove the elements of equitable estoppel, as the Board held, for the Forest Service was bound, on principles of contract, to the promise that days worked at Boundary outside of the normal operating period would be included in determining the Blacksmith termination date. The agency was obligated to grant LDG day for day credit for the days worked at Boundary, subject only to the condition that Blacksmith was not inoperable on those days. The denial of LDG's claim can not be sustained on the primary ground relied upon by the Board.

B

As an alternative ground for denying LDG's claim, the Board found that LDG "received contract term adjustments totaling more days than the actual time lost removing fire-damaged timber from the Boundary sale." The Board found that 214 days were lost, accepting the position of the government's witnesses who testified that Blacksmith was not operable after November 30, 1988. Although this evidence was disputed by LDG, the finding turned on matters of credibility and weight, and must be sustained.

The Board calculated that LDG received an actual credit of 249 days before the October 15, 1989 termination. For this count the Board included the 112 days in the 1988 Normal Operating Season (June 25-Oct. 15) for which extension was granted, and 137 days in the 1989 Season (from June 1, the beginning of the Season,

until October 15) for which extension was granted. LDG has shown no error in the Board's calculations.

LDG argues that its day for day credits should have been applied to extend the Blacksmith contract into the succeeding (1990) Normal Operating Season. However, the Board's finding that full credit for the days lost does not reach into 1990 is supported by substantial evidence. Although we agree with LDG that the contracting officer's proposed extension of the Normal Operating Season to November 30, 1989 was contrary to the terms of the contract, see Section B8.21 quoted supra, LDG nonetheless received its full entitlement of earned extensions by the October 15, 1989 closure.

We conclude that the Forest Service met its commitment to provide full credit at Blacksmith for the days worked at Boundary. On this ground, the Board's decision is affirmed.

No costs.

AFFIRMED

Board of Contract Appeals
United States Department of Agriculture

LDG TIMBER ENTERPRISES, INC.,
AGBCA No. 91-213-1

Appellant

Appearing for the Appellant:

David A. Linn
Linn, Lindley and Blate
Attorneys At Law
P.O. Box 2347
Oakhurst, California 93644

Appearing for the Government:

Lydia T. Grimm
Office of the General Counsel
U.S. Department ofAgriculture
33New Montgomery Street 17thFloor
San Francisco, California 94105-4511 1

DECISION OF THE BOARD OF CONTRACT APPEALS

August 22, 1995

OPINION BY ADMINISTRATIVE JUDGE MARILYNN M. EATON

This appeal arises under Contract No.050649, between the Forest Service, U. S. Department of Agriculture, and LDG Timber Enterprises, Inc., of Oakhurst, California (Appellant). The contract covered the Blacksmith Timber Sale on the Sierra National Forest Califonia.

Appellant contends that contract term adjustments did not adequately compensate it for having suspended operations in order to remove fire-damaged timber from another sale for which Appellant also was the purchaser the Boundary Timber Sale on the Sequoia National Forest, California. Appellant's legal theory is that the Contracting Officer (CO) is estopped from refusing to include time outside the Normal Operating Season, June 1 to October 15, in determining the termination date for the Blacksmith Sale.[1] Appellant claims $173,458.68, the appraised value of uncut timber as of October 15, 1989, when the sale expired uncompleted.

The Board conducted a hearing in Fresno, California, on March 8 and 9, 1995. The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. Secs. 601-613.

FINDINGS OF FACT

1. The Forest Service awarded Contract No.050649, the Blacksmith Timber Sale on the Sierra National Forest, to Appellant on July 25, 1983. The original termination date

[1] On August 30,1994 the Board denied a Government Motion for Summary Judgment finding, among other things, that the appeal raised quests of estoppel. See LDG Timber Enterprises, Inc. AGBCA No.91-213-1,94-3 BCA Par 27, 107.f;

for the sale, which included an estimated 19,410 thousand board feet (MBF) of timber, was June 25, 1988. (Appeal File (AF) (99, 101.)

2. Appellant was also the purchaser of the Boundary Timber Sale on the Sequoia National Forest, more than 100 air miles south of the Sierra National Forest (Transcript (Tr.) 343-44). The Forest Service and awarded Contract No. ****39 covering an estimated 8,10 MBF of timber, to Appellant on October 28, 1981 Tr. 366; Government Exhibit (Gov Ex.) 15). The original ten termination date, March 31, 1985 had been extended to March 31, 1992, to allow the Forest Service to complete an archeological reconnaissance report for the area (Gov't Ex. 5).

3. In late August and early September 1987, lightning ignited the Fay Fire on the Sequoia Tr. 95, 345). The fire affected two subdivisions within the Boundary Sale but did little damage to a third; the Forest Service estimated that 40 percent of the timber on the sale would die (AF 345-46, 358). Appellant had not worked on the Boundary Sale before the fire Tr. 11-12).

4. Appellant orally advised the CO that it was suspending operations on the Blacksmith Sale in order to harvest fire-damaged timber from the Boundary Sale before it deteriorated due to insects and disease Tr. 16, 92-93). Appellant lacked sufficient bonding capacity to operate both sales at the same time Tr. 34).

5. Appellant removed crews and equipment from the Blacksmith Sale on September 21, 1987 Tr. 14; Gov't Ex. 12). The Timber Sale Statement of Account shows that by the end of that month, Appellant had harvested approximately 10,800 MBF (Gov't Ex. 1, page (p.) 39),

leaving 8,610 MBF to be cut.

6. Appellant began shipping logs from the Boundary Sale on October 27, 1987 (Tr. 13).

7. On January 14, 1988, the Forest Service and Appellant executed a "catastrophic damage modification" for the Boundary Sale. The modification increased the estimated volume to 13,460 MBF and redetermined rates retroactive to October 30, 1987. (Appellant's (App.) Ex. 11.) Although only a single rate was specified for each species, it was based on a weighted average that considered green (undamaged) timber at full value and fire-damaged timber at a lesser value (Id.; Tr. 356-57).

8. Under the modification, Appellant was required to remove all dead or dying timber from the Boundary Sale by October 31, 1989 (App. Ex. 11). There is conflicting evidence as to when Appellant actually completed this work. The Timber Sale Statement of Account shows that Appellant removed more than 1,100 MBF per month during March, April, and May 1988, but only 350 MBF in June of that year.[2] The Forest Service representative for the Boundary Sale testified that about 500 MBF of fire-damaged timber remained in early June, and that Appellant had removed the majority of it and moved on to green timber by the end of August 1988 (Tr. 338,362-65,375-76; Gov't Ex. 3.) In a letter to the Blacksmith Sale CO, Appellant stated that it had completed logging fire-damaged timber on December 20, 1988 (Gov't Ex. 4). This *** confirmed by the Timber Sale Statement of Account, which shows activity during

---

[2] The Timber Sale Statement of Account , however, does not distinguish between fire-damaged and green timber.

January 1989 (Gov't Ex. 3, pp. 36-*). The Boundary CO, however, informed the Blacksmith CO that Appellant had removed the last of the fire-damaged timber on January 20, 1989 (AF 52).

9. After two contract modifications extending the contract completion date (see Findings of Fact (FF) *, 17), Appellant resumed operations on the Blacksmith Sale in June 1989, harvesting 1,100 MBF in July and 900 MBF in August, but none in September or October (Gov't Ex. .1, pp.14, 17, *, 27, 31). On October 15, 989, the sale expired uncompleted (AF 52).

Contract Term Adjustments

10. The Blacksmith Sale contract included standard provision B8.21, Contract Term Adjustment, which states that if performance is delayed or interrupted under certain circumstances beyond the purchaser's control,

> [T]he contract term shall be adjusted in writing to include additional calendar days in one or more Normal Operating Seasons equal to the actual time lost
>
> . . . .

(AF 130.)

11. Among the circumstances that qualify for a contract term adjustment under B8.21 is the following:

> [When] Purchaser . . . accepts Forest Service written request to interrupt or delay operations for any purpose other than suspension under B4.4 [payments not received] or * * 3 [purchaser's

> material breach] . . . and the total of such lost time is 10 or more calendar days during the Normal Operating Season.

(Id.)

12. The Blacksmith Sale contract defined Normal Operating Season as June 1 through October 15 (AF 111). Subject to requirements for erosion prevention and control, standard provision C6#31, Operating Schedule, permitted the purchaser to operate outside the Normal Operating Season (AF 126). Special provision C6.31#, Limited Operation Period, however, prohibited logging within units 6-13 of Subdivision 2 between December 1 and July 31. Logging was also prohibited in units 14-19 of Subdivision 2 and all cutting units in Subdivision 3 between October 1 and June 30.[3] These restrictions, as well as limitations on road construction and reconstruction, were to accommodate deer migration as fawning activities (AF 149; Gov't Ex. 9, the Sale Area Map.)

13. The Forest Service did not present Appellant with a written request to suspend operations on the Blacksmith Sale in order to remove fire-damaged timber from the Boundary Sale. The Blacksmith CO advised the Boundary CO that he was willing to consider the signing of the catastrophic damage modification on January 14, 1988 as a written request that Appellant move to the

---

[3] As a practical matter, this meant that after November 30, Appellant's operations were limited to Subdivision 1, which contained cutting units 1-5 (Gov't Ex. 9).

Boundary Sale. The Blacksmith CO considered all operations before that date as merely meeting Appellant's original Boundary Sale obligations. (AF 51; Tr. 275.) Appellant has not disputed the CO's position, so Boundary Sale operations during 1987 are not at issue.

14. On January 19, 1988, Appellant requested a 2-year contract term extension[4] for the Blacksmith Sale (App. Ex. 5.)

15. By letter dated March 10, 1988, the CO responded that in recognition of Appellant's work on the Boundary Sale, Appellant was entitled to 25 calendar days within the Normal Operating Season either to qualify for the extension or to complete the Blacksmith Sale (AF 54). The 25 days represented those lost between June 1 and June 25, 1988 (Tr. 278). Time would begin to run 7 days after Appellant completed harvesting fire-damaged timber or, if Appellant decided to return to the Blacksmith Sale sooner, on the first day of operations within the Normal Operating Season (AF 54).

16. In May 1988, the CO visited the Blacksmith Sale site and determined that the earliest date it could have been operated was May 1 (Tr. 223-24, 281). On June 17, 1988, the CO provided Appellant with a proposed modification extending the termination date of the Blacksmith Sale from June 25 to August 12, 1988. The CO stated that the additional days were granted for time spent on the

---

[4] A contract term extesnion is discretionary with the Forest Service (see FF 29). A contract term adjustment, however, is mandatory so long as the purchaser qualifies under standard provision B8.21.f;

Boundary Sale between May 1 and June 17, 1988, and that if necessary, more time would be granted for diligent operations on the Boundary Sale. (AF 55.) The parties executed the modification on June 20, 1988 (AF 88).

17. On August 11, 1988, the CO provided Appellant with a second proposed modification, extending the termination date of the Blacksmith Sale to August 11, 1989. The extension included 96 days earned on the Boundary Sale through August 12, 1988, plus an additional 40 days based on the estimated completion date for removal of fire-damaged timber. All days were within the Normal Operating Season. In his letter transmitting the modification, the CO stated that if Appellant requested additional adjustment

> **[O]perating days available to you on the Blacksmith Timber Sale <u>that may occur outside the normal operating period will be included in determining a law contract termination date</u>**

(AF 56.) (Emphasis added.) The parties executed this modification on August 23, 1988 (AF 87).

18. On July 26, 1989, the CO provided Appellant with a third proposed modification, this one extending the termination date of the Blacksmith Sale to November 30, 1989. The CO stated that the contract term adjustment was offered as compensation for time spent on the Boundary Sale through November 30, 1988. According to the CO, operations on the Boundary Sale after November 30, 1988, had not been included because the Blacksmith Sale had not been operable after that date. The CO further stated that the Normal Operating Season for the Blacksmith Sale would be modified to correspond to the

new termination date. (App. Ex. 1.)

19. By letter dated July 28, 1989, Appellant's president advised the CO that it did not believe it was in Appellant's best interest to change the Normal Operating Season (AF 80). Appellant's president testified that this was because it would have lost 45 days of "free" time from October 15 to November 30, 1989, when, weather permitting, Appellant could have operated without charge to contract time. (Tr. 24, 34, 35.)

20. In the July 28, 1989, letter Appellant asserted that by its work on the Boundary Sale, it had earned a contract term adjustment for December 1988 and for 20 days in January 1989. Appellant also contended that until December 24, 1988, logs had been delivered from two other sales using the same road system as the Blacksmith Sale (see FF 24-28). Because of the better location of Blacksmith, Appellant alleged, it could have worked until at least January 20, 1989. Appellant sought an extension of the Blacksmith Sale to September 5,1990.[5] (AF 80.)

21. The CO considered Appellant's letter of July 28, 1989, a rejection of the proposed modification (Tr. 290).

22. On or about August 1, 1989, Appellant's president requested a meeting with the Forest Supervisor to discuss the proposed modification. At the meeting, Appellant's president testified, the CO presented him with a letter withdrawing the modification and stating that the

---

[5] The extension would have added 97 days beginningJune 1, 1990. It was intended to compensate Appellant for work on the Boundary Sale for the 97 days from October 15, 1988 to January 20, 1989.

Blacksmith Sale would terminate October 15, 1989. (Tr. 26-27, 29-30, 133.) The CO further stated that the adjustments of August 11, 1988, and July 29, 1989 (actually July 26, see FF 18), had been incorrect, since the contract provided for adjusting the termination date, but did not provide for increasing time beyond that lost within the Normal Operating Season. The CO advised Appellant that more time might be added to the Blacksmith Sale if Appellant qualified for a contract term extension by cutting and removing at least 75 percent of the advertised sale volume. (App. Ex. 2; see also AF 57, a copy of the CO's letter with the handwritten notation "Canceled.")

23. On August 11, 1989, Appellant signed a modification with the October 15, 1989, termination date for the Blacksmith Sale "under protest" (AF 60, 85).

The Meg and Wall Timber Sales

24. Factors determing whether a particular sale can be operated include elevation, aspect, i.e., the direction(s) in which the sale faces, slope (Tr. 412-13), and road conditions (Tr. 192).

25. At the hearing, a representative of Sequoia Forest Industries, purchaser of two other timber sales, Meg and Wall, in the same general area as the Blacksmith Sale, testified that those sales had been operated until December 20, 1988. This witness had been involved in road construction for the Blacksmith Sale in 1976, and during operations in midsummer had driven into the sale area once or twice. (Tr. 175-80, 187, 199.) The Board finds this witness less credible than the Government witnesses who followed him.

26. The ecosystem management officer for the Sierra National Forest, who in his former capacity as a timber management officer had laid out the Meg and Wall Sales (Tr. 394-5), described differences between these sales and the Blacksmith Sale, using U.S. Geological Survey maps showing elevation and contour (Gov't Ex. 18, 19). The Meg Sale, approximately 11 air miles from Blacksmith (Tr. 397), ranged in elevation from 5,200 to 6,400 feet, with predominately south4acing aspect (Tr. 401-02). The Wall Sale, approximately 5 air miles from Blacksmith (Tr. 398), ranged in elevation from 4,800 to 6,800 feet, with varied, mostly western aspect (Tr. 408-09). The Backsmith Sale, however, ranged from 4,800 feet at its southern and to 7,600 feet in the north with about two-thirds above the 6,000 foot level and with varied aspect (Tr. 409-11; Gov't Ex. 21). Even assuming the Meg and Wall Sales had been operable in November and December 1988, this witness stated, only a field review, which neither party conducted, would have shown whether Blacksmith also could have been operated at that time (Tr. 414-15).

27. The hydrologist for the Sierra National Forest introduced National Weather Service records from two stations at elevations representative of the Sierra (Tr. 417,421). These showed 8.25 inches of precipitation, either snow or rain, in November 1988 and 7.93 inches in December 1988 at Grant Grove. There were 5.02 inches and 7.10 inches, respectively, at Huntington Lake. (Tr. 425-26; Gov't Ex. 22.) A large storm occurred just before Christmas 1988, and Appellant's primary activity on the Blacksmith Sale of January 1989 was plowing roads in order to get snowed-in equipment out of the sale area (Tr. 364-65).

28. The Sequoia Forest Industries representative conceded on cross examination that it could not be assumed that the Blacksmith Sale could have been operated just because the Meg and Wall Sales had been. He stated that on the native surface (dirt) roads of the Blacksmith Sale, localized freeze-and-thaw situations would create mud, causing problems with ruts, stability, safety, and erosion. Meg Sale roads were generally all rocked, while the Wall Sale had both native surface and rocked roads. (Tr. 191-95.)

Contract Term Extension

29. The Blacksmith Sale contract included provisions B8.22 and C8.22, both entitled Contract Term Extension. These provisions permit the purchaser to request, but do not require the Forest Service to grant, an extension of the sale termination date. (AF 130-31.) Special provision C8.231, Conditions for Contract Term Extension, required the purchaser to have cut and removed at least 75 percent of the estimated volume of timber at the time of the request (AF 170-71).

30. By letter dated September 11, 1989, the CO notified Appellant that the Timber Sale Statement of Account showed that 12,836 MBF had been removed from the Blacksmith Sale as of August 31, 1989. To qualify for a contract term extension, the CO stated, Appellant would have to remove not less than an additional 1,721 MBF by October 15, 1989. (AF 76.)

31. Appellant's president testified that the CO insisted on Appellant obtaining a bond covering 100 percent of the remaining, uncut timber (Tr. 38); the CO denies having

imposed any such requirement (Tr. 300). According to the Timber Sale Statement of Account for the Blacksmith Sale, as of September 1, 1989, Appellant had a $94,300 payment guarantee available and needed only about $20,000 more to cover the 1,721 MBF qualifying for a contract term extension (Tr. 298-300; Gov't Ex. 1, p.20). As indicated above (FF 9), how ever, Appellant cut no timber fr om the Blacksmith Sale during September or october 1989, and the sale expired uncompleted.

32. Between July and October 1989, Appellant provided bid guarantees for a number of other timber sales on which it bid. These included the Westfall Salvage Sale, bid date July 10; the Sweetpea Salvage Sale, bid date July 17; the Ranch Salvage Sale, bid date August 14; the Rock 55 Sale, bid date also August 14; the Snowplay Salvage Sale, bid date October 2; and the Westfall Salvage Resale, bid date October 16, 1989. Appellant was the high bidder for the Sweetpea Salvage Sale, and provided a cash performance bond for it. (Tr. 15 4-58 165; Gov't Ex. 8.)

Forest Service Damages and Appellant's Claim

33. The Blacksmith Sale contract included provisions B9.4 and C9.4, both entitled Failure to Cut. These specify the method of measuring Forest Service damages if the purchaser fails to cut designated timber by the sale termination date. (AF 133, 175.)

34. In November and December 1989, the Forest Service cruised the Blacksmith Sale area and determined that 5,245 MBF remained uncut. The appraised value of the remaining timber was $258,*66.08. This was more than the current contract value, $173,458.68, so the Forest

Service did not assess damages for failure to cut. Due to environmental concerns, including spotted owl habitat, the Forest Service did not reoffer the Blacksmith Sale. (AF 66-70; Tr. 306-08.)

35. On March 18, 1991, Appellant presented the CO with a certified claim for $173,458.68. Appellant contended that on August 11,1,1988, and July 26, 1989, the Forest Service had agreed to extend the Blacksmith Sale, then refused to do so, damaging Appellant. (AF 63.) The CO denied the claim in a final decision dated May 17, 1991 (AF 49-52), and Appellant timely appealed.

36. At the hearing, in lieu of an opening statement, counsel for Appellant presented the presiding judge with a brief stating that Appellant intended to prove actual damages of $511,071 (App. Trial Brief, p.5). In support of a claim for this amount, Appellant introduced contracts with various mills for purchase of the Blacksmith Sale timber (App. Ex. 6-9), and its president testified that the Forest Service cruise had omitted some uncut timber (Tr. 78-84; App. Ex. 10). Appellant subsequently withdrew the increase and limited its claim to $173,458.68 (Tr. 86).

DISCUSSION

Appellant's Legal Theory:Estoppel

In denying a Government Motion for Summary Judgment, the Board suggested that this appeal raised questions of estoppel (see footnote (n.) 1). On the basis of a fully developed record, however, we find that the CO's initial offers to include days outside the Normal Operating Season in contract term adjustments for the Blacksmith Sale did not estop the Forest Service from

term:flating the sale as of October 15, 1989. This is because Appellant has failed to prove one of the essential elements of estoppel-reliance resulting in injury to Appellant.

Estoppel is a concept that, in appropriate cases, prohibits a contracting party from escaping liability for statements, actions, or inactions. In another appeal in which LDG Timber Enterprises, Inc., attempted to assert estoppel Government, this Board stated that to prevail, Appellant would be required to prove each of the following elements:

> (1) that the Government knew the true facts, Appellant . . . [was] warranted in relying on the Government's conduct, or that the Government intended Appellant to rely on its conduct, (3) that Appellant was ignorant of the true facts, (4) that Appellant was injured and that such injury was caused by Appellant's reliance and (5) that the Government agent was acting within the scope of his or her authority.

LDG Timber Enterprises, Inc. AGBCA No.89-26-1, 92-3 BCA ¶ 25,070, reconsideration denied 93-1 BCA ¶ 25,319, aff'd sub nom LDG Timber Enterprises Inc. v. Madigan 996 F.2d 318 (Fed. Cir. 1993) (Table). See also R. Nash and J. Cibinic, Administration of Government Contracts, pp.74-75 (3d Ed. 1995) (contractor reliance and injury are essential to estoppel; the contractor must establish that its reliance has placed it in a worse position than it would have been otherwise).

In the instant case, Appellant asserts that it relied on two letters from the CO. These include one dated August 11,

1988, in which the CO notified Appellant that operating days on the Blacksmith Sale which were outside the Normal Operating Season would be included in determining a new contract termination date (FF 17), and another dated July 26, 1989, in which the CO proposed a contract modification extending both the Blacksmith Sale termination date and the Normal Operating Season to November 30, 1989 (FF 18).

On July 28, 1989, however, Appellant's president advised the CO that it was not in Appellant's best interest to extend the Normal Operating Season beyond October 15. Appellant's president testified that this was because, without the extension, Appellant would have had 45 "free" days between October 15 and November 30, 1989, when Appellant could have worked without charge to contract time. (FF 19.) Appellant's president subsequently met with the Forest Supervisor to discuss the November 30, 1989, sale termination date (FF 22). Appellant not only rejected the date proposed by the CO, but also attempted to negotiate a further extension of the Blacksmith Sale for 97 days within the Normal Operating Season beginning June 1, 1990 (FF 20; n. 5). We find these actions by Appellant completely inconsistent with reliance on a proposed extension of the Blacksmith Sale termination date, and of the Normal Operating Season, to November 30, 1989.

We hold that Appellant's reliance, if any, on the proposed extension did not place Appellant a worse position than it would have been otherwise. As discussed below, Appellant received contract term adjustments totaling more days than the actual time lost removing fire-damaged timber from the Boundary Sale. In addition, Appellant could have qualified for a contract term extension, but failed to

do so.

Contract Term Adjustments

Days Lost on the Boundary Sale

The length of time Appellant lost due to work on the Boundary Sale is relevant only because of its impact on the Blacksmith Sale.

Work on the Boundary Sale during 1987 is not at. issue. Appellant does not dispute the CO's decision to consider the January 14, 1988 execution of the catastrophic damage modification as a written request, within the meaning of contract provision B8.21, that Appellant suspend operations on the Blacksmith Sale. (FF 13.) Lacking sufficient bonding capacity to operate both the Blacksmith and Boundary Sales at the same time, in September 1987 Appellant made a business judgment to remove crews and equipment from the Blacksmith Sale and harvest the fire-darnaged timber before its condition deteriorated and market value decreased (FF 4, 5).

The CO determined, and Appellant also does not dispute, that in 1988 the earliest date the Blacksmith Sale could have been operated was May 1 (FF 16). Consequently, Appellant's work on the Boundary Sale between January 14 and May 1, 1988, had no impact on the Blacksmith Sale.

As for work after May 1, 1988, there is conflicting evidence as to when Appellant completed harvesting the fire-damaged timber. The Forest Service representative testified that about 500 MBF remained in early June, and that Appellant had removed the majority of it and moved

on to green timber by the end of August 1988. By its own admission, Appellant completed this work by December 20, 1988.[6] (FF 8.) Since the impact of the Boundary Sale ceased to exist when Appellant completed logging the fire-damaged timber, Appellant was entitled to a contract term adjustment equal to no more than the 233 days lost between May 1 and December 20, 1988.

Days Credited on the Blacksmith Sale

We are, moreover, not persuaded that Appellant could have operated the Blacksmith Sale after November 30, 1988. In two of three subdivisions, logging was prohibited in some units after October 1 and in all units beginning December 1 (FF 12). Government witnesses who described elevation, aspect, and weather on the Meg and Wall Sales were more credible than Appellant's witness (FF 24-27). Appellant's witness, moreover, conceded that given localized freeze,and thaw conditions and differences in road surfaces, it could not be assumed that the Blacksmith Sale would have been operable merely because Sequoia Forest Industries had been able to operate two sales in the same general area (FF 28). During January 1989, Appellant's primary activity was plowing roads and extricating snowbound equipment (FF 27).

If we credit Appellant for work on the Boundary Sale between May 1 and the August 31, 1988, date set by the

---

[6] In post-hearing briefs, Appellant appears to have abandoned its allegation that work continued unti January 20.1989 (FF 20), arguing only that it should be credited for Boundary Sale operations until December ,1988.

Forest Service representative, Appellant would be entitled to a contract term adjustment of 123 days. If we credit Appellant for work between May 1 and November 30, 1988, entitlement would increase to 214 days. Appellant was actually grantcd contract term adjustmenb iotaling 249 days: 112 days in 1988 (from June 25, the origin Blacksmith Sale termination date, to October 15) and 37 days in 1989 (from June 1 to Qctober 15, the modified Blacksmith Sale termination date).

Any way we compare days lost on the Boundary Sale with days credited on the Blacksmith Sale, the contract term adjustments more than compensated Appellant for time spent removing fire-damaged timber. Appellant was not injured by the Forest Service's refusal to consider days outside the Normal Operating Season in setting the October 15, 1989, termination date for the Blacksmith Sale.

Contract Term Extension

On August 1, 1989, the CO advised Appellant that more time could be added to the Blacksmith Sale by cutting and removing at least 75 percent of the advertised volume before October 15, 1989 (FF 22). Appellant harvested approximately 2,000 MBF during July and August 1989 (FF 9), and would have had to cut and remove only an additional 1,721 MBF during the next 6 weeks to qualify for a contract term extension (FF 30).

There is no support for Appellant's allegation that the CO insisted on a bond covering 100 percent of the timber remaining on the Blacksmith Sale; the CO denies imposing such a requirement (FF 31). It appears that Appellant elected to use whatever cash or additional

bonding capacity it had to bid on salvage sales, rather than completing the Blacksmith Sale (FF 32). We find that Appellant again made a business judgment, i.e., to let the Blacksmith Sale expire uncompleted on October 15, 1989. Any injury to Appellant was due to this business judgment, not due to reliance on a November 30, 1989, Blacksmith Sale termination date.

Conclusion

In the absence of reliance and resulting injury, we need not consider whether Appellant has proved the other elements of estoppel. We hold that no estoppel lies, and we do not reach the question of quantum.

DECISION

The appeal is denied.

/s/
MARILYNN M. EATON
Administrative Judge
Concurring:

/s/

EDWARD HOURY

ROBERT M. M. SETO

Administrative Judge

Administrative Judge

Issued at Washington, D.C.,

LDG TIMBER ENTERPRISES, INC.,
AGBCA No. 91-213-1

Appellant

Appearing for the Appellant:

David A. Linn
Linn, Lindley and Blate
Attorneys At Law
P.O. Box 2347
Oakhurst, California 93644

Appearing for the Government:

Lydia T. Grimm
Office of the General Counsel
U.S. Department ofAgriculture
33New Montgomery Street 17thFloor
San Francisco, California 94105-4511 1

RULING ON APPELLANT'S MOTION FOR REONSIDERATION

LDG Timber Enterprises, Inc., of Oakhurst, California (Appellant), has filed a timely Motion for Reconsideration of the Board's decision concerning the Blacksmith Timber Sale on the Sierra National Forest. The Government opposes the Motion on grounds that Appellant has neither asserted clear errors of fact or law. nor presented newly discovered evidence.

We agree that Appellant is merely rearguing matters that the Board considered and rejected in its original decision. Although Appellant's Motion therefore could be denied without further discussion, we offer the following summary of previously-found facts and conclusions of law. See LDG Timber Enterprises Inc., AGBCA No. 91-213-1, 1995 WL 505631 (August 22, 1995).

FINDINGS OF FACT

Unless otherwise indicated, the following findings are from our original decision.

1. Appe llant was the purchaser of the Blacksmith Timber Sale on the Sierra National Forest, California, having been awarded Contract No. 050659 on July 25, 1983. The original sale termination date was June 25, 1988.

2. Appellant also was the purchaser of the Boundary Timber Sale on the Sequoia National Forest, California, having been awarded Contract No. 050039 on October 28, 1981. Appellant had not operated this sale before September 1987, when a fire damaged approximately 40 percent of the included timber.

3. Appellant, who lacked sufficient bonding capacity to operate both sale at the same time, orally advised the Contracting Officer (CO) for the Blacksmith Sale that it was suspending operations order to harvest fire-damaged timber on out; Boundary Sale before its condition deteriorated and its market value deceased.

4. On January 14, 1988, the Forest Service and Appellant executed a "catastrophic damage modification" to the Boundary Sale contract The parties considered this to be a written request, in accordance with contract provision B8.21, Contract Term Adjustment which entitled Appellant to additional time to complete the

Blacksmith Sale. The provision stated that if performance were delayed or interrupted for more than 10 calendar days under certain circumstances beyond the purchaser's control, the Forest Service would adjust the contract term "to include additional calendar days in one or more Normal Operating Seasons equal to actual time lost." The Blacksmith Sale contract defined Normal Operating Season as June 1 to October 15.

5. The Blacksmith Sale terminatiori date was the subject of several contract term adjustments. The CO initially granted Appellant 25 days, representing time lost on the Boundary Sale between June 1 and the original termination date, June 25, 1988, and subsequently extended the termination date to August 12, 1988.

6. On August 11, 1988, the CO again offered to extend the Blacksmith Sale termination date, this time to August 11, 1989. In a letter transmitting a proposed contract modification, the CO stated that if additional adjustments were requested,

> [O]perating days available to you on the Blacksmith Timber Sale that may occur outside the normal operating period will be included in determining a new contract termination date.

The parties executed this modification August 23, 1988.

7. The "catastrophic damage modification" to the Boundary Sale Contract required Appellant to remove all dead or dying timber by October 31, 1989. There was conflicting evidence as to when Appellant actually completed this work, but it appeared that the majority of the fire-damaged timber had been removed by August 1988, and Appellant itself stated that it had completed this work by December 20, 1988. The Boundary Sale Co, however, informed the Blacksmith CO that Appellant had removed the last of the fire-damaged timber on January 20, 1989.

8. On July 26, 1989, the CO proposed yet another mcodfication of the Blacksmith Sale termination date. As compensation for Appellant's work on the Boundary Sale through November 30, 1988, the latest date the CO determined Appellent could have worked removing fire-damaged timber, the CO offered to extend the Blacksmith Sale termination date to November 30, 1989. The modification would have extended the Normal Operating Season to correspond with this date.

9. Appellant informed the CO in wriiting that it did not believe it was in its best interest to extend the Normal Operating Season because Appellant would lose 45 days of "free" time when, weather permitting, it could operate without charge to contract time Appellant instead attempted to negotiate an extension of the Blacksmith Sale from June 1 to September 5, 1990, a total of 97 days within the Normal Operating season.

10. The CO considered this a rejection of the proposed modification and instead issued a modification under which the Blacksmith Sale termination date was October 15, 1989. Appellant signed under protest. The CO also advised Appellant that it could qualify for additional time under contract provisions BS.22 and C8.22, Contract Term Extension, by removing at least 75 percent of the estimated timber volume from the Blacksmith Sale.[7]

11. At the time of leaving the Blacksmith Sale, Appellant had harvested approximately 10,800 thousand board feet (MBF), leaving 8,610 MBF uncut. Appellant

---

[7] A contract term adjustment is mandatory if the purchaser qualifies under standard provision B8.21. A contract term extension however, is discretionary with the Forest Service, and generally requires at least 75 percent of the estimated timber volume to have been cut and removed.

resumed operations on the Blacksmith Sale in June 1989, harvesting approximately 1,100 MBF in July and 900 MBF in August, but none thereafter. On October 15, 1989, the sale expired uncompleted.

Appellant's Claim and Issues on Appeal

12. In a claim to the CO and on appeal to the Board, Appellant argued that contract term adjustments had not adequately compensated it for time lost removing fire-damaged timber from the Boundary Sale, and that it was entitled to additional time to complete the Blacksmith Sale. Appellant alleged that it could have operated the Boundary Sale during December 1988 and for *20* days in January 1989, when two other sales in the same general area had been active. Appellant claimed $173,458.68, based on a Forest Service appraisal of the value of uncut timber on the Blacksmith Sale.[2]

13.Appellant's legal theory was that the CO's letters dated August 11, 1988, and July 26, 1989 (Findings of Fact 6, 8), estopped the Forest Service from refusing to include days outside the Normal Operating Season in determining a new termination date for the Blacksmith Sale.[8]

14.The Board held that Appellant had failed to prove an essential element of estoppel, i.e., detrimental reliance Appellant's rejection of the proposed modification extending the Blacksmith Sale termination date to November 30, 1989, or 45 days beyond the Normal Operating Season, and its attempt to negotiate a 97-day extension within the 1990 Normal operating Season, the Board stated, were "completely inconsistent" with reliance on the CO's offer to consider days outside the

---

[8] The Forest Service did not claim damages for Appellant's failure to cut because the appraised value of the remaining timber was greater than the contract value.

Normal Operating Season in granting contract term adjustments. The Board therefore found no estoppel.

15.The Board rejected Appellant's argument that work on the Boundary Sale could have continued until January 20, 1990, finding evidence of weather and road conditions in the Sequoia National Forest, as presented by Government experts, more credible than Appellant's. The Board concluded that Appellant had lost no more than 233 days due to work on the Boundary Sale between May 1 and December 20, 1988, but had already received contract term adjustments totaling 249 days. Appellant therefore had not been injured by reliance, if any, on the CO's statements. The Board denied the appeal.

The Motion for Reconsideration

16. In seeking reconsideration, Appellant argues that the Board erred in finding no estoppel. Appellant primarily asserts that it reasonably relied on the CO's offer to include days outside the Normal Operating Season in determining a new termination date for the Blacksmith Sale. If Appellant had not so relied, the argument goes, in view of its lack of bonding capacity Appellant would have left the Boundary Sale and returned to the "more time sensitive" Blacksmith Sale.

17. In addition, Appellant asserts that it satisfied the reliance element of estoppel by proving that the Forest Service intended Appellant to rely on its conduct. Appellant provides no support for this assertion

18.Finally, Appellant again alleges that it was injured by reliance on the CO's statements. Appellant does not address the Board's finding that the 249 days for which contract term adjustments were granted exceeded the number of days lost due to work on the Boundary Sale.

DISCUSSION

Reconsideration is discretionary with the Board. Reconsideration will be not be granted in the absence of compelling reasons, i.e., clear error of fact or law, or newly-discovered evidence that could not. have been discovered at the time of the original proceeding. Schmalz Construction. Ltd., AGBCA No., 94-122-R, 94-3 BCA Par 27,019. Reconsideration is not intended to allow the moving party to reargue its position, and arguments that could have been raised at the time of the original proceeding provide . no basis for reconsideration. LDG Timber Enterprises, AGBCA No. 92-198-R, 93-1 BCA Par 25,319.

Appellant's Motion is comprised entirely of arguments concerning reliance that the Board has already entertained and rejected. As the Government points out, in denying the appeal, the Board considered evidence and arguments presented in a Motion for Summary Judgment and reply, a pre-hearing brief, 2 days of testimony, and post-hearing briefs and replies.

Appellant's Motion, moreover, does not even address the Board's finding that reliance, if any, was not detrimental. The Board resolved this factual question by calculating the number of days by which the Blacksmith Sale term had been adjusted and finding that they more than compensated Appellant for time lost due to work on the Boundary Sale. In short, no injury, no estoppel.

RULING

Appellant's Motion for Reconsideration is denied.

Concurring:
Adminstrative Judge
Adminstrative Judge

Issued at Washington, D.C., November 17, 1995